

Coalition on Wetland Issues

Proposed Rules
for
Wetlands Standards and 401 Certification Procedures

DIGEST

Adds a new rule concerning wetland water quality standards and a new article to establish procedures and criteria for reviewing federally permitted or licensed activities that require a water quality certification under Section 401 of the federal Clean Water Act. Effective 30 days after filing with the secretary of state.

327 IAC 2-1.8

327 IAC 17

SECTION 1. 327 IAC 2-1.8 IS ADDED TO READ AS FOLLOWS:

Rule 1.8. Wetland Water Quality Standards

327 IAC 2-1.8-1 Applicability

Authority: IC 13-14-8-1; IC 13-14-8-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 1. The wetland water quality standards established in this rule apply to those waters contained in wetlands located within the state which are also waters of the United States. (*Water Pollution Control Board,- 327 IAC 2-1.8-1*)

327 IAC 2-1.8-2 Definitions

Authority: IC 13-14-8-1, IC 13-14-8-2

Affected: IC 4-22-34; IC 13-11-2-265; IC 13-30; IC 14-22-34

Sec. 2. The following definitions apply throughout this rule:

- (1) "Commissioner" means the commissioner of the department of environmental management.
- (2) "Compensatory mitigation" means the restoration, creation, or rehabilitation of a wetland or other waters of the state to compensate for losses of designated and existing uses.
- (3) "Corps of Engineers" or "Corps" means the Corps of Engineers of the United States Department of the Army.
- (4) "Designated uses" are those uses specified in this rule for each wetland whether or not they are being attained.
- (5) "Duration," in regard to inundation or soil saturation, means the length of time, during a growing season, when:

- (A) water stands at or above the soil surface; or
- (B) the soil is saturated.
- (6) "Existing uses" means those uses actually attained in a wetland on or after November 28, 1975, whether or not they are included under section 3 of this rule.
- (7) "Frequency," in regard to inundation or soil saturation, means the periodicity of coverage of an area by surface water or soil saturation.
- (8) "Growing season" means the portion of the year when soil temperature, as measured twenty (20) inches below the surface, is above biological zero (0) (five (5) degrees Celsius or forty-one (41) degrees Fahrenheit).
- (9) "Habitat" means the environment occupied by individuals of a particular species, population, or community.
- (10) "Inundated" means a condition of temporary or permanent water coverage of a land surface.
- (11) "Practicable" means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.
- (12) "Rehabilitation" means the remediation of factors causing degradation of existing and designated uses of a wetland.
- (13) "Restoration" means the modification of a site for the purpose of returning the site, which was previously a wetland, back into a wetland.
- (14) "Saturated" means a situation where all easily drained voids between soil particles in the root zone are temporarily or permanently filled with water up to the soil surface at a pressure greater than atmospheric pressure.
- (15) "Waters" or "waters of the state" has the meaning set forth in IC 13-11-2-265.
- (16) "Waters of the United States" means those waters as defined in 33 CFR §328.3, as modified under or through the decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675 (2001).*
- (17) "Wetland" means an area that is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. For the purpose of this rule, wetlands will be determined and delineated using the U.S. Army Corps of Engineers Wetland Delineation Manual, Technical Report Y-87-1, January 1987.**

*33 CFR § 328.3 is incorporated by reference. Copies of this document may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206. (Water Pollution Control Board; 327 IAC 2-1.8-2).

*The Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1 is incorporated by reference. Copies of this manual may be obtained from the U.S. Army Engineer Waterways Experiment Station, 3909 Halls Ferry Road, Vicksburg, Mississippi 39180 or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206. (*Water Pollution Control Board*, - 327 IAC 2-1.8-2)

327 IAC 2-1.8-3 Wetland designated uses

Authority: IC 13-14-8-1; IC 13-14-8-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 3. The following uses are, or may be, designated for waters in wetlands:

(1) All wetlands are designated as habitat for a well-balanced biotic community that is composed of the flora and fauna typical of the wetland type, including the following:

- (A) Habitat for aquatic organisms, to the extent supported by the specific physical and chemical characteristics of a wetland, including one or more of the following:
 - (i) Fish.
 - (ii) Crustaceans.
 - (iii) Mollusks.
 - (iv) Insects.
 - (v) Annelids.
 - (vi) Planktonic organisms.
- (B) Habitat for wetland flora.
- (C) Habitat for resident and transient wildlife species, including water dependent mammals, birds, reptiles, and amphibians.

(2) All wetlands are designated for hydrologic functions that may include the maintenance of low water stream flow, ground water discharge, ground water recharge, and peak flow suppression.

(3) A wetland may be designated for recreational use, which may range from incidental contact to full-body contact.

(4) A wetland may be designated for aesthetic use.

(Water Pollution Control Board,- 327 IAC 2-1.8-3)

327 IAC 2-1.8-4 Classification of wetlands

Authority: IC 13-14-8-1; IC 13-14-8-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 4. A wetland, other than a wetland that is designated as an outstanding state resource water ("OSRW") or an outstanding national resource water ("ONRW"), shall be classified as a Tier I wetland.

327 IAC 2-1.8-5 Wetland antidegradation implementation standard and procedures

Authority: IC 13-14-8-1; IC 13-14-8-2

Affected: IC 13-18-3; IC 13-18-4; IC 13-18-7; IC 13-23-13; IC 13-24-1; IC 13-25-5

Sec. 5. (a) The following antidegradation requirements apply to Tier I wetlands to assure that proposed discharges to a wetland will not result in a significant adverse effect on existing uses or designated uses or in a net loss of wetland acreage, except as allowed by this section:

- (1) For proposed discharges other than a discharge of dredged or fill material, the appropriate antidegradation provisions of 327 IAC 2-1-2 or 327 IAC 2-1.5-4, whichever is applicable, shall be satisfied.
- (2) Impacts to a wetlands from a proposed discharge of dredged or fill material that are approved by the Corps through a permit issued under Section 404 of the Clean Water Act shall be deemed to satisfy the requirements of this section.
- (3) Impacts to a wetland from a proposed discharge of dredged or fill material that would affect one-tenth (0.1) acre or less of the wetland shall not be subject to any further requirements or restrictions under this section.

(b) *{Antidegradation procedures for OSRW wetlands}*

{These procedures must await WPCB rulemaking to implement SEA 431.}

(c) No degradation of the waters of a wetland designated as an outstanding national resource water (ONRW), except for limited, temporary degradation as described in this subsection, shall be allowed. Degradation to the waters of such wetlands is prohibited unless the following conditions are met:

- (1) If the degradation is threatened by a proposed discharge other than a discharge of dredged or fill material, the person proposing such discharge has satisfied the antidegradation provisions of IC 13-18-3-2.
- (2) If the degradation is threatened as a result of a proposed discharge of dredged or fill material, the following conditions are met:
 - (A) The impact will be temporary, lasting less than eighteen (18) months;
 - (B) The person intending to cause the impact first receives a valid 404 permit for the discharge;
 - (C) The applicant justifies any temporary impact to the wetland as necessary to the accommodation of important social or economic objectives; and
 - (D) The applicant remediates any temporary impacts to the wetland. (*Water Pollution Control Board, 327 IAC 2-1.8-5*)

327 IAC 2-1.8-6 Minimum water quality criteria for wetlands

Authority: IC 13-14-8-1; IC 13-14-8-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 6. (a) The following criteria shall apply in the manner prescribed in the referenced provisions, except where and to the extent exceedances occur due to natural causes, to waters of wetlands to assure attainment of designated uses:

- (1) For wetlands located within the Great Lakes Basin, the water quality criteria set forth in:
 - (A) 327 IAC 2-1.5-8(b);
 - (B) 327 IAC 2-1.5-8(c)(1); and
 - (C) 327 IAC 2-1.5-8(c)(5).
- (2) For wetlands located outside of the Great Lakes Basin, the water quality criteria set forth in:
 - (A) 327 IAC 2-1-6(a);

- (B) 327 IAC 2-1-6(b)(1);
- (C) 327 IAC 2-1-6(b)(5).

(b) For a wetland designated for a recreational use, the appropriate bacteriological criteria listed below shall apply at all times and places to surface waters of the wetland during the recreational season except where and to the extent exceedances occur as a result of natural causes:

- (1) for full-body contact recreation, *E. coli* bacteria, based on membrane filter (MF) count, shall not exceed one hundred twenty-five (125) per one hundred (100) milliliters as a geometric mean of a minimum of five (5) samples equally spaced over a thirty (30) day period, nor exceed two hundred thirty-five (235) per one hundred (100) milliliters in any one sample in a thirty (30) day period;
- (2) For incidental or infrequent contact recreation, *E. coli* bacteria, based on membrane filter (MF) count, shall not exceed five hundred seventy-six (576) per one hundred (100) milliliters in any one sample in a thirty (30) day period.

(c) In addition to the criteria specified in subsection (a), the water quality of a wetland shall be protected to prevent such variations beyond the normal range, due to other than natural causes, for the following parameters as would cause significant adverse effects on populations of water dependent flora and fauna that are characteristic of the wetland:

- (1) temperature;
- (2) pH;
- (3) dissolved oxygen; and
- (4) nutrients.

(Water Pollution Control Board,- 327 IAC 2-1.8-6)

327 IAC 2-1.8-7 Criteria to designate a wetland as an outstanding state resource water
Authority: IC 13-14-8-1; IC 13-14-8-2; IC 13-18-3-2
Affected: IC 13-18-3; IC 13-18-4; IC 14-31-1-8; IC 14-31-1-11

Sec. 7. (a) A wetland may be designated as an outstanding state resource water (OSRW) by the board by rule if the board determines that the wetland has a unique or special ecological, recreational, or aesthetic significance.

(b) Before the board may adopt a rule designating a wetland as an OSRW, the board must consider the following:

- (1) economic impact analyses, presented by any interested person, taking into account future population and economic development growth;
- (2) biological criteria scores for the wetland, using factors that consider, as applicable, fish communities, macroinvertebrate communities, and chemical quality criteria using representative biological data from the wetland under consideration;

- (3) the level of current urban and agricultural development in the watershed for the wetland;
- (4) whether the designation of the wetland as an OSRW will have a significant adverse effect on future population development, and economic growth in the watershed, if the wetland is in a watershed that has more than three percent (3%) of its land in urban land uses or serves a municipality with a population greater than five thousand (5,000); and
- (5) whether the designation of the wetland as an OSRW is necessary to protect the unique or special ecological, recreational, or aesthetic significance of the wetland.

327 IAC 2-1.8-8 Criteria to designate a wetland as an outstanding national resource water

Authority: IC 13-14-8-1; IC 13-14-8-2; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4; IC 14-31-1-8; IC 14-31-1-11

Sec. 8. Wetlands that may be considered for designation as an outstanding national resource water include wetlands that are recognized as:

- (A) important because of protection through official action, such as:
 - (1) federal or state law;
 - (2) presidential or secretarial action;
 - (3) international treaty; or
 - (4) interstate compact;
 - (B) having exceptional recreational significance;
 - (C) having exceptional ecological significance;
 - (D) having other special environmental, recreational, or ecological attributes; or
 - (E) wetlands whose designation as outstanding national resource waters is reasonably necessary for the protection of other waters so designated.
- (Water Pollution Control Board, - 327 IAC 2-1.8-8)*

327 IAC 2-1.8-9 Procedures for designating a wetland as an outstanding national resource water

Authority: IC 13-14-8; IC 13-18-3-2

Affected: IC 13-14-9; IC 13-18-3; IC 13-18-4

Sec. 9. (a) A wetland may be designated as an outstanding national resource water (ONRW) only by the general assembly after recommendations for designation are made to the general assembly by the board and the environmental quality service council.

(b) Before recommending the designation of an ONRW, the department shall provide for an adequate public notice and comment period regarding the designation. The commissioner shall present a summary of the comments and information received during the comment period and the department's recommendation concerning designation no later than ninety (90) days after the end of the comment period.

(Water Pollution Control Board, - 327 IAC 2-1.8-9)

SECTION 2. 327 IAC 17 IS ADDED TO READ AS FOLLOWS:

ARTICLE 17. WATER QUALITY CERTIFICATION

Rule 1. Water Quality Certification - General Provisions

327 IAC 17-1-1 Purpose

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 1. This article establishes procedures and criteria for the review of applications for state water quality certification required by Section 401 of the federal Clean Water Act, 33 U.S.C. §1341. (*Water Pollution Control Board, 327 IAC 17-1-1*)

327 IAC 17-1-2 Applicability

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 2. (a) This article governs determinations by the department with respect to applications for water quality certifications pursuant to Section 401 of the Clean Water Act. Such a certification must be obtained by an applicant for a federal license or permit to conduct an activity (including but not limited to the construction or operation of facilities) that may result in any discharge into navigable waters of the United States originating from within the state of Indiana, which certifies that the discharge will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act (33 U.S.C. §§1311, 1312, 1313, 1316, and 1317).

(b) Federal permits or licenses to which this rule applies include but are not limited to the following:

(1) A permit from the U.S. Army Corps of Engineers issued pursuant to either of the following:

(A) Section 10 of the River and Harbors Act.

(B) Section 404 of the federal Clean Water Act.

(2) A license issued by the Federal Energy Regulatory Commission. (*Water Pollution Control Board, 327 IAC 17-1-2*)

327 IAC 17-1-3 Requirement for a water quality certification

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 3. No person may conduct an activity that requires a federal permit or license and that may result in a discharge originating from within the state of Indiana into waters of the United States unless the department has issued or waived a water quality certification under this article for the activity. (*Water Pollution Control Board, 327 IAC 17-1-3*)

327 IAC 17-1-4 Definitions

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-2

Affected: IC 13-11-2-265

Sec. 4. In addition to the applicable definitions contained in IC 13-11-2, the following definitions apply throughout this rule:

- (1) “Adjacent property owner” means an owner of land that is adjacent to the site of a proposed project that is the subject of a water quality certification application.
- (2) “Administrator” means the administrator of the United States Environmental Protection Agency or an authorized representative, including the regional administrator for Region V.
- (3) “Applicable provisions of federal law and state law” means the provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act (33 U.S.C. §§1311, 1312, 1313, 1316, and 1317) and other appropriate provisions of Indiana law, including state water quality standards as established in 327 IAC 2-1, 2-1.5, and 2-1.8.
- (4) “Applicant” means an individual, corporation, or other entity that owns the site that is the subject of an application for a water quality certification.
- (5) “Channel” means the flowpath of a waterway, including streams, ditches, rivers, and other related water courses.
- (6) “Clean Water Act” means the Federal Water Pollution Control Act, as amended (33 U.S.C. §§ 1251, *et seq.*).
- (7) “Commissioner” means the commissioner of the department of environmental management.
- (8) “Compensatory mitigation” means the restoration, creation, or rehabilitation of a wetland or other waters of the state to compensate for losses of designated and existing uses.
- (9) “Corps general permit” means a permit issued by the Corps of Engineers that:
 - (A) authorizes a category of discharges of dredged or fill material under the Clean Water Act where the categories of discharge:
 - (i) are similar in nature;
 - (ii) will cause only minimal adverse environmental effects when performed separately;
 - (iii) will have only minimal cumulative adverse effect on the environment; and
 - (B) is issued by the Corps of Engineers pursuant to 33 U.S.C. 1344(e).
- (10) “Corps individual permit” means a permit issued by the Corps of Engineers pursuant to 33 U.S.C. 1344(a).
- (11) “Corps permit” means a Corps general permit or a Corps individual permit.
- (12) “Corps of Engineers” means the United States Department of the Army, Corps of Engineers.
- (13) “Creation” means the manipulation of a site for the purpose of turning the site, which was not previously a wetlands into a wetlands
- (14) “Cumulative impacts” means the effects on waters of the state that are attributable to the collective effect of multiple discharges.

- (15) “Deep water” means areas that are permanently inundated at mean annual water depths greater than six and six-tenths (6.6) feet. These are areas that are not wetlands and may include lakes, rivers, ponds, and borrow pits.
- (16) “Department” means the Indiana department of environmental management.
- (17) “Emergent wetland” means a wetland that is characterized by erect, rooted, herbaceous hydrophytes, excluding mosses and lichens.
- (18) “Enhancement” means the conversion of one wetland type to another with a higher perceived value; it is considered to be an impact to a wetland's existing and designated uses.
- (19) “Farmed wetland” means a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on December 23, 1985, did not support woody vegetation and is inundated for fifteen (15) consecutive days or more during the growing season or ten percent (10%) of the growing season, whichever is less, in most years (fifty , (50) percent chance or more).
- (20) “Final decision” means a decision by the commissioner to issue, deny, modify, revoke, or waive a Section 401 water quality certification.
- (21) “Forested wetland” means a wetland dominated by woody vegetation that has a diameter, at breast height, greater than three (3) inches, regardless of total height. Wetlands that have been cleared of woody vegetation within five (5) years previous to the project will be considered forested wetlands by the department.
- (22) “404(b)(1) Guidelines” means the regulations established by the U.S. EPA, 40 CFR Part 230, to guide the review of proposed discharges of dredged or fill materials into the navigable waters in accordance with Section 404(b)(1) of the Clean Water Act.
- (23) "Navigable waters" means waters of the United States.
- (24) “Open water” means areas of a wetland that are permanently inundated at mean annual water depths less than or equal to six and six-tenths (6.6) feet. These areas may contain little or no vegetation.
- (25) “Practicable” means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.
- (26) “Preservation” means the maintenance and protection of a wetland via a deed restriction or a conservation easement to insure that designated and existing uses are protected from anthropogenic activities.
- (27) “Rehabilitation” means the remediation of factors causing degradation of existing and designated uses of a wetlands
- (28) “Relocation” means the alteration of the flow line of a waterway, including new alignments, tiling, piping, or other related practices.
- (29) “Restoration” means the manipulation of a site for the purpose of returning the site, which was previously a wetlands back into a wetlands
- (30) “Scrub-shrub wetland” means a wetland dominated by woody vegetation having a height greater than three and two-tenths (3.2) feet and a stem diameter less than three (3) inches. This includes true shrubs, young trees, and trees or shrubs stunted by environmental conditions.
- (31) “Secondary impacts” means impacts on waters of the state that are associated with a discharge but do not result from the actual discharge.

- (32) "Shaping or other alteration" means the manipulation of streambanks to make the channel wider or narrower or an alteration of the slopes of streambanks.
- (33) "Tier I wetland" means a wetland classified as such according to 327 IAC 2-1.8-4.
- (34) "Water dependent" means a project that inherently requires access to, proximity to, or siting within a water body in order to fulfill the basic purpose of the project.
- (35) "Water quality certification" or "WQ certification" means a certification issued by the department in accordance with Section 401 of the Clean Water Act (33 U.S.C. 1341).
- (36) "Waters of the United States" means those waters as defined in 33 CFR § 328.3, as modified under or through the decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675 (2001).*
- (37) "Waters" or "waters of the state" has the meaning set forth in IC 13-11-2-265.
- (38) "Watershed" means a geographic region within which water drains into a particular river, stream, or other body of water.
- (39) "Wetland" means an area that is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. For the purpose of this rule, wetlands will be determined and delineated using the U.S. Army Corps of Engineers Wetland Delineation Manual, Technical Report Y-87-1, January 1987**.

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**The Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1 is incorporated by reference. Copies of this manual may be obtained from the U.S. Army Engineer Waterways Experiment Station, 3909 Halls Ferry Road, Vicksburg, Mississippi 39180 or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206. (*Water Pollution Control Board, 327 IAC 17-1-4*)

Rule 1.5. Waivers of Certification

327 IAC 17-1.5-1 Categorical Waivers

Sec. 1. A water quality certification shall be waived, categorically, for any project governed by a Corps general permit unless the project proposes a discharge of dredged or fill material into a wetlands or other waters of the state which is designated as an OSRW or an ONRW.

327 IAC 17-1.5-2 Discretionary Waivers

Sec. 2. A water quality certification may be waived by the department at any point in the review of an application for such a certification. The department shall provide an explanation of its rationale for the waiver at the time it issues the waiver. A discretionary waiver issued under this section shall be subject to 327 IAC 17-6.

327 IAC 17-1.5-3 Deemed Waivers

Sec. 3. The failure of the department to issue a decision on an application for a water quality certification within the time period provided under 327 IAC 17-2-1(e) shall be conclusively deemed to be a waiver of the certification.

Rule 2. Application and Notice

327 IAC 17-2-1 Application requirements

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 1. (a) Unless the project is of a type for which a water certification has been categorically waived in this article, an application for a water quality certification must be submitted to the department in advance of commencement of the project and must:

- (1) be on a form approved by the commissioner;
- (2) contain all information requested by the application form, including but not limited to:
 - (A) a description of the project or activity proposed by the applicant for which a federal permit or license is required and which may result in a discharge to waters of the United States;
 - (B) the purpose and intended use for the project or activity;
 - (C) a description of any structures that are to be erected in or adjacent to waters of the United States as a part of the project or activity;
 - (D) the nature of the discharge(s) which may result from the project or activity to be undertaken under the federal permit, including the type, composition, and quantity of materials to be discharged;
 - (E) a description of possible impacts to wetlands, streams, or other waters of the United States; and
 - (F) a description of any compensatory mitigation proposed by the applicant;
- (3) be legible;
- (4) contain the signed statement required by subsection (b);
- (5) be signed by the applicant;
- (6) if the application involves a proposed discharge to a wetland, include a wetland delineation performed in accordance with procedures established by the Corps of Engineers according to the Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1 (January 1987)*, which depicts all wetlands on the subject property;

(7) provide a list of names and addresses of adjacent property owners to the proposed project.

(b) An application submitted under this section must contain the following statement, signed by the applicant, "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. The information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(c) If the applicant is legal entity other than an individual, the application must:

(1) be signed as follows:

(A) for a corporation, by a responsible corporate officer;

(B) for a partnership or sole proprietorship, by a general partner or the sole proprietor, respectively;

(C) for a municipality, other political subdivision, or a state or federal agency, by a principal executive officer or ranking elected official; and

(2) contain the name of the individual who shall be primarily responsible for the project that is to be certified.

(d) Within thirty (30) days after receipt of an application for a WQ certification, the department shall review the application for completeness of the information contained therein. If the department determines that additional information is necessary to complete the application, it shall promptly notify the applicant in writing and request such information. The application is not considered complete so that review of the application may proceed until the applicant has submitted the requested information.

(e) The department shall make a final determination upon an application for a water quality certification within one hundred twenty (120) days after receipt of a complete application. A failure by the department to act within this period, unless an extension is consented to by the applicant in writing, shall constitute a waiver of the water quality certification.

(f) The applicant has the burden of proving that its project will comply with the applicable provisions of the federal Clean Water Act and state law.

*The Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1 is incorporated by reference. Copies of this manual may be obtained from the U.S. Army Engineer Waterways Experiment Station, 3909 Halls Ferry Road, Vicksburg, Mississippi 39180 or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206. (*Water Pollution Control Board, 327 IAC 17-2-1*)

327 IAC 17-2-2 Public notice of a water quality certification application

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 2. (a) Except as provided in subsection (2), the commissioner shall provide public notice of and an opportunity to comment on applications submitted to the department for water quality certification.

(b) The public notice must contain the following information:

- (1) The applicable statutory and regulatory authority.
- (2) The name and address of the applicant and, if any, the applicant's agent.
- (3) The name, address, and telephone number of the department's employee who may be contacted concerning the application.
- (4) The location of the proposed project, including the fourteen (14) digit hydrologic code of the watershed in which the project is located.
- (5) A brief description of the proposed project, including the following:
 - (A) Its purpose and intended use.
 - (B) A description of any structures that are to be erected.
 - (C) The type, composition, and quantity of materials to be disposed of or discharged.
 - (D) Possible impacts to wetlands, streams, or other waters of the state.
 - (E) A description of any compensatory mitigation proposed by the applicant.
- (6) A statement telling where the public may view or obtain a copy of the plan and elevation drawing, if reproducible, showing the general and specific site location.
- (7) A statement that the comment period deadline is twenty-one (21) calendar days from the date of mailing of the public notice unless otherwise specified.
- (8) A statement that any person may request in writing that a public hearing or meeting be held to consider the application.

(c) The department shall provide notice of an application for a water quality certification to the following:

- (1) The applicant.
- (2) Adjacent property owners to the proposed project, as provided by the applicant under section 1(a)(7) of this rule.
- (3) The following agencies:
 - (A) Department of natural resources.
 - (B) United States Environmental Protection Agency.
 - (C) United States Fish and Wildlife Service.
 - (D) Any state or federal agency responsible for issuing water quality certification in any other state whose water quality may be adversely affected by a proposed project.
 - (E) The plan commission for any county in which the proposed project would be located in whole or in part.
- (4) Any person who requests copies of public notices of water quality certification applications.

(d) The department shall consider comments received during the public comment period and may forward comments received, via certified mail, within five (5)

working days after the close of the comment period, to the applicant for a response. The applicant shall provide the department with a written response to the comments, within fourteen (14) days of receipt of the comments, with the following exceptions:

- (1) If an applicant requires additional time to respond to comments, the applicant shall inform the department in writing within the fourteen (14) day response time period.
- (2) The department may place an application on hold for a time period agreed upon with the applicant requesting additional time.

If an applicant fails to provide a written response to comments received, the department may deny the application.

(e) The department shall issue a supplemental public notice of an application in the event of one (1) of the following:

- (1) The department originally denied the application for water quality certification, but the applicant has submitted a new or modified proposal.
- (2) The applicant is proposing to significantly change a project for which the department had previously provided public notice and the department received comments from the public on the project as originally proposed.
- (3) A request for modification of a water quality certification is made according to 327 IAC 17-5.

(f) If the applicant is proposing to significantly change a project for which the department had previously provided public notice, but the department received no public comment on the project, the department may issue a supplemental public notice.

(g) A joint public notice shall be issued by the department and the Corps of Engineers, utilizing the public notice procedures set forth in 33 CFR § 325.3, if an application for a water quality certification requires a corps individual permit. (*Water Pollution Control Board, 327 IAC 17-2-2*)

327 IAC 17-2-3 Procedures for notification to adjacent states

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-2; IC 13-18-3-3

Affected: IC 13-18-3; IC 13-18-4

Sec. 3. (a) If the department determines that a proposed project may adversely affect the quality of the waters of another state, the department shall notify the following about the receipt of the application:

- (1) The administrator.
- (2) The certifying agency in any state whose water quality may be affected.

(b) In addition to rights granted to a state under Section 401(a)(2) of the Clean Water Act, a state whose water quality may be adversely affected by project activities shall be allowed sixty (60) days after receipt of the notification provided under subsection (a)(2) to:

- (1) respond to the department; and
- (2) provide comments; and
- (3) specify objections to the application.

(*Water Pollution Control Board, 327 IAC 17-2-3*)

327 IAC 17-2-4 Public hearing or meeting

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 4. (a) A person may request in writing that a public hearing or meeting be held to consider issues related to potential water quality impacts in connection with a specific application for water quality certification. The request must state the reason for requesting the public hearing or meeting as specifically as possible and must be submitted to the department during the public comment period provided under section 2 of this rule

(b) The department may hold a public hearing or public meeting if-

- (1) substantial questions about the project are raised during the comment period;
- (2) new information is obtained about water quality issues; or
- (3) significant interest is expressed in the project.

(c) The department shall publish, in a daily or weekly newspaper in general circulation throughout the area affected by the discharge, a public notice of a scheduled public hearing or meeting setting forth the date, time, and place. The department shall notify landowners specified under subsection (a)(7) of the public hearing or meeting. The department shall locate the public hearing or meeting in the vicinity of the proposed project.

(d) The department shall encourage an applicant to attend a public hearing or meeting held concerning the applicant's proposed project.

(e) Any person may appear at a public hearing or meeting and present oral or written comments concerning the proposed project.

(f) The department shall consider comments received at the public hearing or meeting or submitted to the department within fourteen (14) days of the public meeting or hearing before a decision may be rendered on the application.

(g) A public hearing shall be recorded and a transcript prepared. A copy of the transcript must be available for purchase from the department or the transcriber of the public hearing and be available for public inspection during normal business hours at the department. A public meeting will not be recorded. (*Water Pollution Control Board, - 327 IAC 17-2-4*)

Rule 3.1 Review of Applications for Water Quality Certifications

327 IAC 17-3.1-1 Applications relating to federal permits other than Corps permits

Sec. 1. An application for a water quality certification that pertains to an application for a federal permit other than a Corps permit shall demonstrate that any discharge of pollutants which may occur as a result of the project activity for which authorization is sought under the federal permit will comply with:

- (1) applicable provisions of Sections 301, 302, 303, 306 and 307 of the Clean Water Act (33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317); and
- (2) any water quality-based effluent limitations established to assure attainment of applicable water quality standards contained in 327 IAC 2-1, 2-1.5 or 2-1.8.

327 IAC 17-3.1-2 Applications relating to Corps permit for a Tier I wetland or other waters which are not an OSRW or ONRW

Sec. 2. An application for a water quality certification that pertains to an application for a Corps permit for a discharge of dredged or fill material into a Tier I wetland or other waters of the United States which are not designated as an OSRW or an ONRW shall:

- (1) certify that the applicant has provided all documentation as required under the 404(b)(1) Guidelines with respect to the projected impact upon the affected wetlands or other waters to result from the discharge of dredged or fill material that is a part of the proposed project activity for which authorization is sought under the Corps permit; and
- (2) demonstrate that the discharge of dredged or fill material proposed under the Corps permit is adequately designed and controlled so that it will not result in the release of pollutants into waters outside the specific disposal site for the dredged or fill material which would violate applicable water quality standards contained in 327 IAC 2-1, 2-1.5 or 2-1.8.

327 IAC 17-3.1-3 *[OSRWs]*

{Application requirements for a water quality certification that pertains to an application for a Corps permit for a discharge affecting an OSRW should be added after WPCB rules are established concerning implementation of SEA 431.}

327 IAC 17-3.1-4 Applications relating to a Corps permit that would impact an ONRW

Sec. 4. An application for a water quality certification that pertains to an application for a Corps permit for a discharge of dredged or fill material into a wetland or other waters of the United States which is designated as an ONRW shall demonstrate the following:

- (1) the impact to the ONRW from the discharge of dredged or fill material to occur as a part of the proposed project activity for which authorization is sought under the Corps permit will be temporary, not exceeding eighteen (18) months in duration, and will affect an insubstantial fraction of the ONRW as a whole;
- (2) the applicant has provided all documentation required under the 404(b)(1) Guidelines;

- (3) the applicant justifies the temporary impact to the ONRW to the Commissioner in accordance with the applicable antidegradation provisions of 327 IAC 2-1, 2-1.5, or 2-1.8;
- (4) the discharge of dredged or fill material proposed under the Corps permit is adequately designed and controlled so that it will not result in the release of pollutants into waters outside the specific area to receive the dredged or fill material which would violate applicable water quality standards contained in 327 IAC 2-1, 2-1.5 or 2-1.8.

327 IAC 17-3.1-5 Department review of applications

Sec. 5. The department shall review an application for a water quality certification to determine whether it satisfies the criteria of section 1, 2, 3 or 4 of this rule, as applicable.

Rule 4. Compensatory Mitigation

327 IAC 17-4-1 General Applicability

Sec. 1. (a) Compensatory mitigation shall not be required in the case of discharges associated with federally-permitted projects which are not discharges of dredged or fill material and which, therefore, are not projected to result in the loss of wetlands or other waters of the United States.

(b) Other than for proposed discharges into a wetland or other waters of the United States that is designated as an OSRW, the applicant proposing a discharge of dredged or fill materials into waters of the United States shall provide compensatory mitigation as required by the Corps under the 404(b)(1) Guidelines with respect to the projected impact of the proposed discharge.

327 IAC 17-4-2 Additional compensatory mitigation requirements with respect to OSRWs

{This section should be deferred until WPCB rules are established with respect to implementation of SEA 431.}

Rule 5. Issuance, Denial, Revocation, Modification, or Expiration of a Water Quality Certification

327 IAC 17-5-1 Departmental action regarding a water quality certification

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; 1 C 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 1. (a) The department shall grant, deny, or waive a water quality certification in accordance with the provisions of this article in response to an application for such a certification and shall provide notice of such action as specified by 327 IAC 17-6-1.

(b) If the department grants a water quality certification, then the department shall include in the certification such effluent limitations, monitoring requirements and related conditions as the department reasonably determines to be necessary to ensure that the applicant complies with the applicable provisions of Sections 301, 302, 303, 306, or 307 of the Clean Water Act, and any water quality-based limitations or restrictions arising under state water quality standards contained in 327 IAC 2-1, 2-1.5, or 2-1.8. (*Water Pollution Control Board, 327IAC 17-5-1*)

327 IAC 17-5-2 Revocation or modification of a water quality certification

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-14-1-13; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 2. (a) The department may revoke a water quality certification if one (1) of the following occurs:

(1) The applicant does not comply with one (1) or more conditions of the water quality certification.

(2) The applicant has failed to:

(A) Implement compensatory mitigation measures as specified by the federal permit or the water quality certification.

(B) Construct the project according to plans or specifications submitted to and reviewed by the department and the deviation from those plans and specifications is reasonably determined to threaten an increased adverse impact to water quality, including but not limited to an increased loss of wetlands or other waters.

(3) The applicant has misrepresented or failed to disclose fully all relevant facts in the application or during the application process.

(b) The department may modify a water quality certification if the department:

(1) receives a request from the applicant holding a valid water quality certification, to modify a project or its associated impacts; or

(2) determines that modification is necessary to ensure compliance with applicable provisions of federal or state law that have changed since issuance of the certification including changes in:

(A) the applicable water quality criteria; or

(B) applicable effluent limitations or other requirements of state law.

(c) The department shall process an application for modification as if it were an original application. (*Water Pollution Control Board, 327 IAC 17-5-2*)

327 IAC 17-5-3 Expiration of a water quality certification

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 3. (a) A water quality certification granted or waived by the department shall expire two (2) years after its issuance date if work is not commenced within wetlands or other waters. The department may extend the expiration date if:

- (1) requested by the applicant prior to the original expiration date; and
- (2) the department determines there has not been a change in the circumstances related to the water body or project as originally proposed.

(b) A water quality certification granted by the department for a corps general permit shall:

- (1) be effective for the duration of the corps general permit; and
- (2) be modified or revoked if the department determines the corps general permit is causing or contributing to significant impacts to water quality.

(Water Pollution Control Board,- 327 IAC 17-5-3)

327 IAC 17-5-4 Emergency issuance of a water quality certification

Authority: IC 4-21.5-4-1; IC 4-21.5-4-2; IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1;
IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 4. The commissioner:

- (1) may issue an emergency water quality certification if:
 - (A) an unacceptable and immediate threat to human life, water quality, or waters of the state, including wetlands, may occur; or
 - (B) a severe loss of property may result;before a water quality certification could be issued in accordance with normal procedures according to this article;
- (2) shall issue a public notice, no later than ten (10) days after the issuance of an emergency water quality certification, which:
 - (A) states the reasons for the emergency issuance; and
 - (B) complies with the requirements of 327 IAC 17-2-2; and
- (3) shall incorporate, into an emergency water quality certification, all standards and criteria that would normally be applied to a project not being reviewed under the emergency provision of this section.

(Water Pollution Control Board, 327 IAC 17-5-4)

Rule 6. Notice and Appeal of Final Decision

327 IAC 17-6-1 Notice of final decision

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2
Affected: IC 4-21.5

Sec. 1. (a) The department shall serve notice of its final decision on an application for a water quality certification by certified mail on the applicant and the following persons:

- (1) Those who submitted comments during the comment period.
- (1) Those who requested notice of the final decision.

(b) A final decision regarding a water quality certification issued by the department may be appealed in accordance with IC 4-21.5 and IC 13-15-6. A notice of final decision must include reference to the procedures available to appeal a final decision by requesting an adjudicatory hearing.

(c) A final decision becomes effective fifteen (15) days after service of the mailing is made, unless a petition for review and a petition for stay are filed according to IC 4-21.5-3-5 with the office of environmental adjudication within that fifteen (15) day period. (*Water Pollution Control Board, 327 IAC 17-6-1*)

Rule 7. Conditions Applicable to a Water Quality Certification

27 IAC 17-7-1 Responsibilities

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 1. (a) An applicant must comply with the conditions of the water quality certification issued in response to the application.

(b) Issuance of a water quality certification does not:

- (1) relieve the applicant of its duty to comply with federal and state laws or obtain other permits or authorizations required to conduct the project;
- (2) authorize injury to persons or private property or invasion of other private rights;
- (3) authorize impacts or activities not detailed in the application; or
- (4) convey property rights or exclusive privileges.

(*Water Pollution Control Board, 327 IAC 17-7-1*)

327 IAC 17-7-2 Right of entry

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-14-2-2; IC 13-18-3-1; IC 13-18-3-2;
IC 13-18-3-9

Affected: IC 13-18-3; IC 13-18-4

Sec. 2. (a) The department or its authorized representative, upon presentation of proper credentials, shall have the following rights:

- (1) A right of entry to, upon, or through any premises, public or private:
 - (A) that are the subject of the application, including property that is the site of the proposed compensatory mitigation;
 - (B) where records, reports, monitoring or treatment equipment or methods, samples, or other data, required to be provided or maintained, are located; and
 - (C) that contain a possible violation of this article.
- (2) Access to and right to copy any record that is required to be kept or submitted under the terms of the certification.
- (3) Access to inspect monitoring, treatment, or operational equipment or facility.
- (4) Access to take samples.

(b) The department may authorize an employee of the department or other person under contract with the department to act as its representative. (*Water Pollution Control Board, 327 IAC 17-7-2*)

327 IAC 17-7-3 Compliance and abatement orders

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2; IC 13-18-3-9, IC 13-18-4-6

Affected: IC 13-30

Sec. 3. (a) The department may conduct an inspection to determine compliance with a water quality certification or applicable provisions of federal and state laws.

(b) If the department determines that a person is violating or is about to violate a provision of 327 IAC 17 or a condition of a water quality certification, the department shall serve notice on the person, by certified mail, of the department's determination. The notice shall include an order against the person to immediately cease the violation and complete one (1) of the following actions:

(1) Rectify the violation by restoring the water body to its pre-violation condition.

(2) Submit an application to the department for a water quality certification for the unauthorized activity.

(*Water Pollution Control Board, 327 IAC 17-7-3*)

327 IAC 17-7-4 Enforcement

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-14-1-12; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-30

Sec. 4. A violation of this article may subject a person causing or contributing to the violation to administrative or judicial enforcement proceedings and the penalties provided pursuant to IC 13-30. (*Water Pollution Control Board,- 327 IAC 17-7-4*)